

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF YAVAPAI

2010 APR 26 AM 11:17
JEANNE HICKS, CLERK

B. Hamilton ✓

BY: _____

THE STATE OF ARIZONA,)

Plaintiff,)

vs.)

STEVEN CARROLL DEMOCKER,)

Defendant.)

P1300

No. CR 2008-1339

BEFORE: THE HONORABLE THOMAS B. LINDBERG
JUDGE OF THE SUPERIOR COURT
DIVISION SIX
YAVAPAI COUNTY, ARIZONA

PRESCOTT, ARIZONA
FRIDAY, APRIL 2, 2010
9:01 A.M.

REPORTER'S TRANSCRIPT OF PROCEEDINGS

IN CHAMBERS HEARING

RULE 10.1 HEARING HELD IN DIVISION TWO
BEFORE THE HONORABLE ROBERT M. BRUTINEL

TESTIMONY OF ANNE CHAPMAN, THOMAS B. LINDBERG,
AND JEFFREY PAUPORE

ROXANNE E. TARN, CR
Certified Court Reporter
Certificate No. 50808

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APRIL 2, 2010
9:07 A.M.

IN CHAMBERS HEARING

APPEARANCES:

FOR THE STATE: MR. JOE BUTNER AND MR. JEFF
PAUPORE. INVESTIGATOR SECHEZ.

FOR THE DEFENDANT: MR. JOHN SEARS, MR. LARRY
HAMMOND AND MS. ANNE CHAPMAN. INVESTIGATOR ROBERTSON.

(Whereupon, the following was held in chambers.)

THE COURT: Record can show this is a meeting
in chambers. Defendant is not present but all three defense
counsel are, their investigator. And Mr. Butner for the
State. Mr. Paupore for the State. Mr. Sechez.

MR. BUTNER: Judge, I am the one that asked
for this meeting. And I feel really uncomfortable about
this, but let me just explain. The last time that we were in
chambers when we were talking about the 404(b) evidence, as
part of the trial in this matter and as part of the State's
case in chief.

THE COURT: You are referring primarily to
Miss O'non or to something different than that?

MR. BUTNER: Just all of it. It was before we
started the hearing. We were talking about it, and then we
moved from the subject of the 404(b) evidence to the penalty
phase of the trial, if you will recall that, and I was
basically saying that, you know, certain items of evidence

1 that the defense had brought up, like the HGH, and multiple
2 affairs and that kind of thing, and the FINRA documents.
3 They were concerned that the State might be wanting to use
4 those things in the case in chief, and I indicated at that
5 point in time, you know, that I was not going to do that,
6 that that wasn't where we were going, but that we did want to
7 be using that evidence in the penalty phase, if we got there.

8 THE COURT: If you got to that point.

9 MR. BUTNER: And you made the comment "I don't
10 believe we are going to get there." And this was after, you
11 know --

12 THE COURT: I don't think I said that. I
13 think I said, I am not sure we are going to get to that.

14 MR. BUTNER: Well, I confirmed the comment
15 with Ms. Chapman, and Mr. Paupore who heard it just exactly
16 like that.

17 THE COURT: I will hear from them.

18 MR. BUTNER: And, of course, you know, you
19 have already found probable cause to support three death
20 penalty aggravators in this case. And when I heard that
21 comment, I was really, really concerned that you have, at
22 least to some extent, made up your mind in this case, that
23 you have pre-judged the case to some extent, that you are no
24 longer impartial and that you have some bias. And, you know,
25 this is a very, very serious case. We have all worked

1 extremely hard on the case. But that comment indicated to me
2 that I don't think that the State will be able to receive a
3 fair and impartial trial in this case.

4 And so the reason that I asked for this
5 meeting in chambers was to ask you to recuse yourself as a
6 result of not really being impartial anymore.

7 THE COURT: All right. Mr. Paupore.

8 MR. PAUPORE: Yes, sir.

9 THE COURT: Did you hear a comment that I said
10 we are not going to get to that point?

11 MR. PAUPORE: What I heard, Judge, I heard you
12 say is you didn't believe we were going to get to the penalty
13 phase. It was just kind of rolled out in a real casual kind
14 of way, but I did hear it that way, sir.

15 THE COURT: Mr. Sears.

16 MR. SEARS: I will plead partial deafness. I
17 remember the discussion. Your honor, I don't mean to be flip
18 with this, it is a very serious matter, but I don't have a
19 clear recollection of what you said, if anything, about that.

20 I think we are talking about the
21 conversation we had off the record; is that right?

22 MR. BUTNER: That's correct.

23 MR. SEARS: Okay.

24 THE COURT: Miss Chapman.

25 MS. CHAPMAN: What I recall you saying is "if

1 you get to that point," or "I am not sure if we are going to
2 get to that point."

3 THE COURT: Mr. Hammond.

4 MR. HAMMOND: I actually can't claim deafness,
5 but I spoke very briefly to Mr. Butner about this on the
6 telephone. I didn't realize this is why he was asking me.
7 But I don't remember the comment that way. I remembered it
8 as, I guess the word I would use is prefatory, that is I
9 thought the Court was simply observing that if we get there,
10 that is an issue. I didn't regard it as is a pre-judgment.
11 If I had, I probably would have focused on it, but I really
12 didn't. And I don't have a clear memory, so I don't know if
13 you can count on my recollection.

14 THE COURT: Anyone else that was present?
15 Mr. Robertson.

16 MR. ROBERTSON: I was not present.

17 THE COURT: Mr. Sechez?

18 MR. Sechez: I was not present.

19 THE COURT: I don't believe that I said --
20 indicated my belief that we were not going to get to that
21 phase of the proceedings. Whenever you have a jury trial, I
22 recognize that the defendant is presumed by law to be
23 innocent. And I have heard much more in this case than I
24 have in most cases prior to a trial occurring.

25 I don't have any biases against the

1 State's evidence in the case. I am not the one that will
2 judge the case as far as the facts are concerned. The jury
3 is the one that decides the facts of the case. And I think I
4 said, "if we get to that point."

5 I don't believe that there is a reason
6 for me to recuse from the case at this point. So I am going
7 to deny the request to recuse from the case.

8 MR. BUTNER: Judge --

9 THE COURT: If you want to put something more
10 on the record or do something else, please do.

11 MR. BUTNER: We are going to have to, Judge.
12 We are going to file a 10.1 notice for cause on the basis of
13 that comment.

14 THE COURT: All right.

15 MR. BUTNER: I have that stuff to file now.

16 THE COURT: What do you want to do with regard
17 to today's hearings?

18 MR. BUTNER: Well, I don't think -- until we
19 resolve this issue, I don't think we can go forward.

20 THE COURT: I expect you are correct in that
21 regard.

22 MR. SEARS: Can we have a moment to confer,
23 Judge, maybe?

24 THE COURT: You may.

25 MR. HAMMOND: Your Honor, I may need more than

1 just a moment. I want to take a look at the rule if I could.
2 I understand, just before we go, that what is being suggested
3 here is that we should suspend all proceedings until there is
4 an opportunity for a hearing on the motion to remove you for
5 cause.

6 Is that what the motion is?

7 THE COURT: I think so.

8 MR. BUTNER: That is basically the motion,
9 sir, and I will give you a copy of it as soon as I file it.
10 Do you want me to give it to you now?

11 MR. HAMMOND: That would help us.

12 THE COURT: I am not sure I have my pocket
13 part in what I just gave you.

14 MR. HAMMOND: I have my little pamphlet.

15 Your Honor, maybe given the seriousness
16 of this, rather than just stepping outside for a moment,
17 maybe we ought to take a couple of minutes and allow us to
18 confer and do a little bit of thinking.

19 THE COURT: I will do that. We have a lot of
20 issues concerned with the case that are going to be sitting
21 unresolved. We have a jury, what is essentially part of the
22 jury voir dire process, going on even as we speak. So I
23 think if that is filed, I am going to have to refer it
24 immediately to Judge Brutinel and see what he wants to do in
25 terms of setting a hearing on this.

1 MR. SEARS: If we could have a moment, Judge,
2 and take our leave.

3 THE COURT: Well, you may.

4 MR. BUTNER: Madam Clerk, I believe you are
5 the person I give these to.

6 THE CLERK: Okay.

7 MR. BUTNER: Thank you, very much.

8 (Whereupon, at 9:11 a.m. a recess was taken.)

9 (Whereupon, the following was held in open court.)

10 THE COURT: It is 9:45. We were set this
11 morning at nine o'clock in connection with the variety of
12 motions that were set for this morning. We had a conference
13 on the record in chambers with the lawyers present.

14 The State has subsequently filed a 10.1
15 motion for a change of judge for cause, together with an
16 attached affidavit. The Court's duty, I believe, is to refer
17 the matter to another judge to consider that motion.

18 Mr. Hammond, Mr. Sears, Ms. Chapman are
19 here with the defendant. Mr. Paupore and Mr. Butner here for
20 the State. Do you have any disagreement with my observation
21 about I think I can't do anything on the case unless and
22 until this is decided by a different judge?

23 MR. BUTNER: I agree, Judge.

24 THE COURT: Mr. Hammond?

25 MR. HAMMOND: Your Honor, I have looked at the

1 rule in the few minutes that we have had this morning, and I
2 want to put on the record, first, that we think this motion
3 is filed in bad faith. We think it is filed for
4 inappropriate reasons having to do with the State's position
5 in this case. We think it is nothing short of outrageous.

6 However, we read the rule, I think,
7 almost exactly the same way the Court has read it. Under
8 Rule 10.1, an affidavit having been filed alleging bias and
9 prejudice, the Court is under a duty to communicate, I
10 believe, with the presiding judge, and the presiding --

11 THE COURT: Which I will indicate for the
12 record I have done, solely to indicate that I have a 10.1
13 motion, who should I refer it to?

14 MR. HAMMOND: I believe it is -- and it may
15 not matter materially, but it is the responsibility, I
16 believe, of the presiding judge to make the decision to whom
17 the case is assigned. At least in theory, if you were guilty
18 of bias and prejudice, you shouldn't be, yourself, selecting
19 the judge who passes on this motion, which is why the rule is
20 written in this two-step way.

21 We feel totally hamstrung by this. We
22 think you have to confer with the presiding judge, and the
23 presiding judge, either himself -- believes he could do it
24 himself, or he could appoint another hearing judge. All we
25 would ask, since we have no alternative under the rule, is

1 that this be done as quickly as humanly possible. If it
2 could be done in the next five minutes, we would think that
3 appropriate.

4 THE COURT: As I say, I communicated solely
5 with Judge Brutinel the fact that a 10.1 motion has been
6 filed in this case. He has indicated to me that he would be
7 willing and able to hear that immediately, and that would be
8 in his courtroom. However, he needs to use my staff, the
9 bailiff and court reporter and probably the clerk, because
10 the Division Two staff is elsewhere today, I think for some
11 training.

12 Mr. Butner.

13 MR. BUTNER: Judge, I just wanted to note that
14 this is not filed in bad faith. I have never filed a motion
15 like this before in my entire career. It was filed honestly
16 and sincerely and with much trepidation.

17 THE COURT: You don't have any reason to have
18 trepidation from my standpoint. I understand the motivation
19 for it. And it is probably something that should be heard,
20 and should be heard quickly, because we do have the jury
21 selection process going on. And there is nothing to be done
22 with it until Judge Brutinel makes a decision on the motion.

23 So I will stay any further action on the
24 pending motions. I will refer the matter to the presiding
25 judge. I did not advise him in any way, shape or form what

1 the reason for it was. And if he needs or seeks my
2 testimony, if you all need or seek my testimony, I will be
3 down when called by you or the judge.

4 So I will direct the parties to
5 immediately proceed to Division Two. I think Judge Brutinel
6 is ready for you. The defendant must be there, as well. So
7 I will direct the detention staff to take him. And I will
8 direct my staff to go assist Judge Brutinel with making an
9 appropriate record.

10 Stand in recess.

11 (Whereupon, the following is a 10.1 hearing held in
12 Division Two in front of the Honorable Robert M. Brutinel.)

13 THE COURT: CR 2008-1339, State versus
14 DeMocker. The record will reflect the presence of the
15 defendant, who is represented through his attorneys,
16 Mr. Hammond and Mr. Sears. The State is present with their
17 attorneys, Mr. Butner and Mr. Paupore.

18 This is the time and date set for a
19 hearing on the State's motion for change of judge for cause.
20 And gentlemen, I note that we have Judge Lindberg's court
21 reporter with us today. Do either of you have an objection
22 to that?

23 Mr. Butner.

24 MR. BUTNER: No, Judge. No objection to that.

25 And I would just like to state again for

1 the record that this is not for the purposes of delay and
2 this is done in good faith. I have never, ever filed a
3 motion like this before.

4 THE COURT: Noted.

5 Mr. Hammond, any problem with the court
6 reporter?

7 MR. HAMMOND: No, I have no problem with the
8 court reporter, Your Honor, but there are a couple of more
9 people that ought to be identified.

10 For the record, our colleague Anne
11 Chapman from the offices of Osborn and Maledon, who has been
12 involved with the case since the outset is here. And Richard
13 Robertson, our investigator, is also here.

14 Thank you.

15 THE COURT: Thank you, Mr. Hammond.

16 Mr. Butner, I read the motion, I will
17 hear from you.

18 MR. BUTNER: Judge, it pretty clearly states
19 what the reason the State has filed this motion is, and that
20 is because we feel as if we were not going to be able to get
21 a fair and impartial trial from Judge Lindberg now on the
22 basis of a comment that he made in chambers off the record
23 concerning the fact that -- and our recollection, quite
24 frankly, is that when the discussion was taking place
25 concerning Rule 404(b) evidence in the State's case in chief,

1 the discussion then went to the penalty phase of the trial,
2 and Judge Lindberg stated "I don't believe we will get
3 there." And we believe that that demonstrates that he no
4 longer can be unbiased and impartial in this case. And as a
5 result of that, we don't believe that we will be able to
6 receive a fair trial.

7 THE COURT: What you ask for in the motion is
8 to call Judge Lindberg to testify to determine his
9 impartiality.

10 MR. BUTNER: That's correct, Judge, and there
11 are other witness that we would call, also.

12 THE COURT: Mr. Hammond, do we disagree that
13 the statement was made?

14 MR. HAMMOND: Yes, Your Honor, we do disagree
15 that the statement was made in the way it has been
16 characterized here.

17 We have had a conversation about this in
18 Judge Lindberg's chambers on the record this morning. And
19 each of the people who were at the last conference have
20 described their memories, and the Judge has also given us his
21 memory. We do dispute vigorously the characterization of
22 what the judge said. We think that is not what he said. He
23 simply observed that we aren't at the penalty phase yet, and
24 he said something like "if we get there." He did not express
25 an opinion about the merits of the case or about whether the

1 death penalty would or would not be appropriate.

2 As I said in Judge Lindberg's court, Your
3 Honor, we think this motion is filed in bad faith. We think
4 there is absolutely no basis for it. But we understand under
5 the rule that we need to have a hearing. We have no choice
6 about that. And so whatever has to be done in order to
7 satisfy the Court that this judge -- and the standard,
8 obviously, that we are all looking at under 10.1 is whether
9 Judge Lindberg can provide a fair and impartial trial.

10 And if we have to bring Judge Lindberg in
11 and put him under oath in order to establish that to this
12 Court's satisfaction, then so be it. But we have a whole day
13 of motions pending today. We are a month from trial. So
14 whatever we can do to expedite this, we do so without waiving
15 any objections that we may have to the filing of this motion
16 this morning by the prosecutor. But we understand that we
17 need to move forward and get this done.

18 THE COURT: Thank you, Mr. Hammond.

19 Mr. Butner, who do you intend to call?

20 MR. BUTNER: I would call Ms. Chapman to the
21 stand, and Mr. Paupore to the stand, and also Judge Lindberg.

22 THE COURT: You may proceed.

23 MR. BUTNER: Thank you.

24 Ms. Chapman.

25 THE CLERK: You do solemnly swear or affirm

1 under the penalty of perjury that the testimony you are about
2 to give will be the truth, the whole truth, and nothing but
3 the truth, so help you God?

4 THE WITNESS: I do.

5 THE COURT: Mr. Butner.

6 MR. BUTNER: Thank you judge.

7 ANNE CHAPMAN,
8 called as a witness, having been duly sworn, testified as
9 follows:

10 DIRECT EXAMINATION

11 BY MR. BUTNER:

12 Q. Please state your name for the record.

13 A. Anne Chapman.

14 Q. What is your occupation?

15 A. I am an attorney.

16 Q. And are you the attorney for Mr. Steven DeMocker
17 in this case, one of them?

18 A. I am.

19 Q. Were you in chambers in Division Six of the
20 Superior Court on March 30th of the year 2010?

21 A. I was.

22 Q. And present at that time was with you Mr. Sears
23 and Mr. Hammond?

24 A. Along with others, yes.

25 Q. And Mr. Paupore from the County Attorney's office

1 was there, as well as myself; is that correct?

2 A. That's correct.

3 Q. And do you recall us engaging in an off-the-record
4 discussion at the request of defense counsel on that day?

5 A. I am not sure who requested the conversation, but
6 I know we engaged in an off-the-record conversation.

7 Q. We were in the judge's chambers; correct?

8 A. Correct.

9 Q. No court reporter present?

10 A. Correct.

11 Q. Do you recall the discussion in chambers turning
12 to the admissibility of evidence under Arizona Rule of
13 Evidence 404(b)?

14 A. I know that was part of the conversation, yes.

15 Q. And do you recall the discussion turning to
16 specific items of evidence, HGH injections, and a FINRA
17 complaint, and other matters that could be characterized as
18 404(b) evidence?

19 MR. HAMMOND: Your Honor, might we approach
20 the bench, please?

21 THE COURT: You may.

22 (Whereupon, the following discussion
23 was held off the record.)

24 MR. HAMMOND: Your Honor, the reason we
25 were in chambers in the first place is that there were

1 certain matters that are going to be kept out of the
2 trial that are not being made public because we think
3 that would be prejudicial. We have a jury that is in
4 the process of filling out questionnaires right now. We
5 went into chambers for, among other reasons, to talk
6 about the HGH and about other matters that we deemed
7 extraneous, and the prosecutor agreed they were
8 extraneous, and that is what we are talking about now.
9 We are putting it on the record in this proceeding.

10 THE COURT: Mr. Butner.

11 MR. BUTNER: Judge, that is exactly true,
12 but the fact of the matter is that is what the
13 discussion was about.

14 THE COURT: You will not go into matters
15 which the parties have agreed that are extraneous to the
16 trial. There is no reason to prejudice the jury panel.

17 I take it it was not a conversation
18 we're concerned about.

19 MR. BUTNER: I won't go further than I
20 have been.

21 Can I get her to answer the question
22 that I just asked, and the reason is because it is about
23 that evidence?

24 THE COURT: You can ask her for a yes or
25 no to the question just asked.

1 MR. BUTNER: Thank you, judge.

2 (Whereupon, the following was held in open court.)

3 THE COURT: Proceed.

4 MR. BUTNER: Thank you

5 Q. I am simply asking for a yes or no answer to that
6 last question in terms of what we were discussing. Do you
7 recall that?

8 A. Yes.

9 Q. Thank you.

10 Then after discussing what type of 404(b)
11 evidence would not be used in the State's case in chief, do
12 you recall us discussing the fact that possibly some of that
13 evidence might be used in the penalty phase of the trial, if
14 we were to get there.

15 A. I recall you discussing that was your intent, yes.

16 Q. And at that point in time, did you hear a judge --
17 hear Judge Lindberg make a comment that he didn't think we
18 were going to get to the penalty phase?

19 A. No.

20 Q. What did you hear Judge Lindberg say, Ms. Chapman?

21 A. That he wasn't sure we were going to get to the
22 penalty phase, or if we get to the penalty phase, we will
23 address those issues at that time.

24 Q. So it was a lengthy comment that you just recited?

25 A. It was one or the other of those comments. I

1 don't recall with specificity what he said.

2 Q. Do you recall a telephone conversation where you
3 and Mr. Hammond called me on my cell phone? I think you were
4 driving in a car at the time, on a day following this
5 in-chambers meeting.

6 A. I recall we were driving, and we tried to call you
7 on speaker phone, and Mr. Hammond ended up speaking with you
8 directly. But I was not on the call because the speaker
9 phone did not work.

10 Q. So you couldn't hear what I had to say?

11 A. That's correct.

12 Q. Do you recall Mr. Hammond saying to me that he
13 didn't recall but Miss Chapman did recall?

14 A. I don't recall particularly what Mr. Hammond said.
15 What I recall him saying is "I think Anne heard something
16 like that."

17 MR. BUTNER: Could I have just a moment,
18 Judge?

19 THE COURT: You may.

20 MR. BUTNER: Thank you.

21 Q. So if I am correct in my understanding,
22 Ms. Chapman, you gave two statements. You are not really
23 specific as to what Judge Lindberg said in regard to whether
24 we were going to get to the penalty phase; is that correct?

25 A. I know he didn't say what you asked me if he said.

1 I know he either said "I am not sure if we are going to get
2 there," or "if we get there, we are going to deal with it
3 then."

4 Q. So your recollection is he said, "I am not sure we
5 are going to get there," or the other version that you recall
6 is, "if we get with there, we will deal with it then"?

7 A. Correct. We were talking about whether or not
8 404(b) evidence was going to be admitted in the penalty
9 phase.

10 MR. BUTNER: Thank you. I don't have any
11 further questions of this witness at this time.

12 THE COURT: Mr. Hammond, you may cross
13 examine.

14 CROSS-EXAMINATION

15 BY MR. HAMMOND:

16 Q. Miss Chapman, let's expand a little bit on the
17 conversation that Mr. Butner just asked you about.

18 We were returning from Prescott to
19 Phoenix the day after hearings with the Court. Is that your
20 memory?

21 A. That's correct.

22 Q. Tell the Court again, so that this can be as clear
23 as we can make it, the context in which the call from Joe
24 Butner occurred.

25 A. After the hearing on Tuesday, we -- Judge Lindberg

1 had asked us to address another issue on Friday morning. So
2 we were trying to call Mr. Butner on the drive back to
3 discuss the issue that we were going to address in court on
4 Friday morning. We tried to call him on the speaker phone.
5 The speaker phone did not work. He could not hear us. So
6 you, Mr. Hammond, picked up the phone, so that you could
7 speak directly with Mr. Butner and Mr. Butner could hear
8 Mr. Hammond, to speak about the issue of witnesses who are
9 going to testify in the penalty phase being prevented to sit
10 during the trial on the guilt and innocence phase. That is
11 what the conversation was about.

12 Q. So you were in my pickup truck. I had my ear
13 phone on so that I could hear Mr. Butner; is that correct?

14 A. That's correct. And I could hear your end of the
15 conversation, to the extent I was listening to your end of
16 the conversation.

17 Q. And in anything that was translated from me to
18 you, having listened to Mr. Butner on the phone, did you get
19 any impression at all that Mr. Butner was asking whether the
20 judge might have been biased or anything other than totally
21 impartial?

22 A. No.

23 Q. Did anything that happened in that conversation
24 suggest to you that Mr. Butner might have been concerned
25 about whether the State of Arizona could get a fair trial?

1 A. No.

2 Q. Would it be a fair characterization of your part
3 of that conversation that this was an extraneous off-the-cuff
4 remark by Mr. Butner in the course of a conversation about
5 another topic?

6 MR. BUTNER: Objection. She didn't hear
7 Mr. Butner's comment, Judge.

8 THE COURT: Overruled. You may answer.

9 THE WITNESS: Yes.

10 BY MR. HAMMOND:

11 Q. And in response to whatever Mr. Butner said that
12 you didn't hear, tell the Court again, so that we have it
13 clearly on the record, what you recall me saying, if you
14 recall at all.

15 A. What I recall, and I don't recall specifically,
16 but what I recall is you saying something like, "I didn't
17 hear that, but Anne heard something like that."

18 Q. And then tell the Court again what you recall
19 saying in response to that, if anything? Did you say
20 anything back to me to report to Mr. Butner?

21 A. No. No, you didn't ask me, and you were -- you
22 continued the conversation with Mr. Butner, and I was not
23 involved in the conversation that you were having with
24 Mr. Butner.

25 Q. So that we are clear about this, this is, then,

1 not one of those situations in which there is a two-way
2 conversation back. You didn't provide information to me,
3 which I then turned around and provided to Mr. Butner?

4 A. No. You didn't ask me anything, and Mr. Butner,
5 as far as I could tell from your end, didn't ask you to ask
6 me anything.

7 Q. So the entire extent of the communication with you
8 had to do with what I said, Mr. Hammond said, you had said,
9 quote-unquote, something like that?

10 A. That I had heard something like that.

11 Q. Okay. At any other time in the last three or four
12 days have you had any communication with Mr. Butner in which
13 he asked you anything about what the judge had said in
14 chambers on Tuesday?

15 A. No. Mr. Butner has never asked me directly what I
16 heard or what I recalled.

17 Q. Do you communicate directly with Mr. Butner on
18 other matters?

19 A. Routinely.

20 Q. Do you have his cell phone number?

21 A. I do.

22 Q. Does he have yours?

23 A. He does.

24 Q. You are, in fact, the person who on a day-to-day
25 basis, at least recently, has had numerous direct

1 communications with Mr. Butner; is that correct?

2 A. Correct.

3 Q. But no communication with him directly on this
4 topic?

5 A. None.

6 Q. Whatsoever?

7 A. None.

8 MR. HAMMOND: Thank you.

9 THE COURT: Mr. Butner, redirect.

10 MR. BUTNER: Thank you.

11 REDIRECT EXAMINATION

12 BY MR. BUTNER:

13 Q. So, going back to this conversation that took
14 place through Mr. Hammond in the pickup truck, the
15 conversation started on speaker phone on Mr. Hammond's
16 telephone; is that correct?

17 A. Well, there was no conversation through
18 Mr. Hammond with you and I.

19 Q. I didn't ask you that, Ms. Chapman. I said the
20 conversation started -- the conversation that I had with, I
21 thought, you and Mr. Hammond, started on speaker phone with
22 Mr. Hammond's phone; is that correct?

23 A. I believe we dialed and you said "Hello" and you
24 said "I can't hear you," so that --

25 Q. So the conversation began on Mr. Hammond's

1 telephone; right?

2 A. That's correct.

3 Q. And it was on speaker phone at that point in time;
4 is that correct?

5 A. For a few moments, yes.

6 Q. At some point in the conversation I indicated to
7 you and Mr. Hammond I was having difficult hearing you?

8 A. Almost immediately, yes.

9 Q. And you only heard the half of the conversation
10 that was being uttered by Mr. Hammond once he took his phone
11 off speaker phone; is that correct?

12 A. Yes.

13 Q. And sometime during that conversation, Mr. Hammond
14 made the statement "I didn't hear that, but Anne did,"
15 something along those lines?

16 A. He said, "I didn't hear that, but I think Anne
17 heard something like that."

18 Q. I was the person saying what the statement was on
19 the other end; is that correct?

20 A. Yes. Mr. Hammond was speaking with you.

21 Q. Right. And I had basically inquired of
22 Mr. Hammond if he had heard the statement that Mr. Hammond
23 was commenting on; is that correct?

24 A. I assume so, but I didn't hear that.

25 Q. You didn't actually hear what I said to

1 Mr. Hammond; is that correct?

2 A. Correct.

3 Q. So you did hear Mr. Hammond state to me "Anne
4 heard something like that"?

5 A. Yes.

6 Q. And what was your understanding at that time as to
7 what Mr. Hammond's conversation and my conversation was
8 about?

9 A. I didn't have one.

10 Q. Mr. Hammond consulted you, though; right?

11 A. No, he didn't.

12 Q. Pardon?

13 A. He did not.

14 Q. So was Mr. Hammond correct then when he said "Anne
15 heard something like that"?

16 A. Well, I don't know what you said to Mr. Hammond.
17 I recounted to you what I recalled Judge Lindberg saying
18 today.

19 Q. So you really don't know what Mr. Hammond and I
20 were talking about?

21 A. I wasn't on the call.

22 Q. So is that correct you didn't know what
23 Mr. Hammond and I were talking about?

24 A. No.

25 Q. And so when Mr. Hammond said "Anne heard something

1 like that," you didn't know what he was talking about?

2 A. No.

3 Q. And you didn't correct him at that time?

4 A. I couldn't have corrected him because I didn't
5 know what he was talking about.

6 Q. I see.

7 MR. BUTNER: Excuse me for a moment, Judge.

8 Q. Before this telephone conversation that took place
9 between me and Mr. Hammond, and you were riding along with
10 him in the pickup truck, had you and Mr. Hammond had
11 discussions about the meeting that we had in chambers
12 concerning 404(b) evidence?

13 MR. HAMMOND: Your Honor, I object on
14 privilege grounds --

15 THE COURT: Sustained.

16 MR. HAMMOND: -- between any conversation
17 between the two of us.

18 THE COURT: Sustained.

19 MR. BUTNER: No further questions. Thank you.

20 THE COURT: You may step down.

21 Mr. Butner, you may call the next
22 witness.

23 MR. BUTNER: Judge, I would like to call
24 Mr. Hammond at this point, in light of the testimony by the
25 previous witness. He is the person I had the discussion

1 with.

2 THE COURT: Did you have a discussion with
3 Mr. Hammond about the specific thing that you were certain
4 Judge Lindberg said?

5 MR. BUTNER: Exactly.

6 THE COURT: And Mr. Hammond said "I didn't
7 hear that, but Ms. Osborn did." Is that what he told you?
8 I'm sorry, Ms. Chapman.

9 MR. BUTNER: That is basically what he said,
10 Judge.

11 THE COURT: Then why would you call him?

12 MR. BUTNER: To establish that I had made the
13 statement to him and it was of concern to me.

14 THE COURT: No. Call your next witness.

15 MR. BUTNER: I call Judge Lindberg to the
16 stand.

17 THE COURT: Very well.

18 THE BAILIFF: On his way, Your Honor.

19 THE COURT: Thank you.

20 THE CLERK: You do solemnly swear or affirm
21 under the penalty of perjury that the testimony you are about
22 to give will be the truth, the whole truth, and nothing but
23 the truth, so help you God?

24 THE WITNESS: I do.

25 THE COURT: Mr. Butner.

1 MR. BUTNER: Thank you, judge.

2 THOMAS B. LINDBERG,
3 called as a witness, having been duly sworn, testified as
4 follows:

5 DIRECT EXAMINATION

6 BY MR. BUTNER:

7 Q. Judge Lindberg, please --

8 A. I think there is only one judge in the room at a
9 time.

10 Q. Please state your name for the record.

11 A. You may call me Mr. Lindberg, if you wish.

12 THE COURT: I believe if "judge" is your
13 title -- you can suit yourself, but he can certainly refer to
14 you as Judge Lindberg.

15 THE WITNESS: Okay. I appreciate either one,
16 then.

17 My name is Thomas B. Lindberg.

18 BY MR. BUTNER:

19 Q. What is your occupation, sir?

20 A. Judge of the Superior Court, Division Six, Yavapai
21 County Superior Court.

22 Q. And you are the presiding judge on the State
23 versus Steven Carroll DeMocker case; is that correct?

24 A. I have been.

25 Q. On March 30th of the year 2010, at approximately

1 3:00 p.m., I believe, did we have a meeting in your chambers
2 concerning this case?

3 A. We did.

4 Q. Was it an off-the-record meeting?

5 A. It was.

6 Q. No court reporter present?

7 A. That's correct.

8 Q. And present at that meeting were Mr. John Sears,
9 Mr. Larry Hammond and Ms. Anne Chapman on behalf of
10 Mr. DeMocker, and Mr. Paupore and myself on behalf of the
11 State?

12 A. Correct.

13 Q. Judge, do you recall how we were seated before you
14 at that meeting?

15 A. Not particularly.

16 Q. Okay. Do you remember that I was seated off to
17 your right on the side, and Mr. Hammond was seated in front
18 of you to your left, and Mr. Sears was seated in front of you
19 to your right?

20 A. Basically.

21 Q. And do you recall Ms. Chapman was seated back
22 behind the other gentlemen on the couch?

23 A. As she customarily has been.

24 Q. Okay. Thank you, Judge.

25 Do you recall that we -- that one of the

1 main topics and one of the main reasons we were having that
2 discussion was concerning 404(b) evidence of a sensitive
3 nature that we did not want to discuss in open court.

4 A. My understanding of the reason for the meeting was
5 some concerns about media coverage, and that the lawyers had
6 asked to see me off the record prior to the hearing
7 commencing.

8 Q. And do you recall that the discussion did turn to
9 some 404(b) evidence that the defense was concerned about the
10 State offering in it's case in chief?

11 A. Besides Miss O'non's testimony, yes.

12 Q. And you recall that the State indicated that we
13 are not going to be offering that type of evidence as part of
14 the State's case in chief, but we might be offering that type
15 of evidence if we reach the penalty phase?

16 A. Correct.

17 Q. And when the subject of the penalty phase came to
18 the Court's attention, do you recall making a comment about
19 the penalty phase?

20 A. I recall that I may have made a comment, yes.

21 Q. And what do you recall specifically, if you can,
22 what your comment was?

23 A. To the best of my knowledge, it was a comment
24 along the lines of, "if we reach the penalty phase," or "I
25 don't know that we will reach the penalty phase."

1 Q. Do you recall specifically the words that you
2 used?

3 A. I do not.

4 Q. Do you recall with specificity that you did not
5 say the words, "I don't believe we are going to get there"?

6 A. Since I don't hold that belief, I don't believe I
7 would have made that statement. Neither now nor on March
8 30th do I hold that belief.

9 Q. But you don't recall with specificity not saying
10 that statement?

11 A. I think I have answered that as best I can.

12 Q. Judge, do you recall -- I guess it was probably
13 on -- on or about March the 2nd of the year 2010, following
14 the argument concerning the constitutionality of the death
15 penalty statute vigorously argued by Mr. Hammond and then
16 counter argued, so to speak, by myself, do you recall asking
17 me about whether the State was continuing to evaluate the
18 death penalty allegation in this case?

19 A. I am not precisely sure of the timing on that, but
20 I do recall making comment about whether the State was
21 continuing to make evaluations about whether the death
22 penalty was or was not going to be sought.

23 Q. Judge, why did you ask me that?

24 A. To make a determination as to what the position of
25 the State was and whether there was some on-going evaluation

1 going on.

2 Q. You had previously made a judicial determination
3 that the -- that there was probable cause for three
4 aggravating factors for the death penalty in this case;
5 correct?

6 A. Correct, and I struck a couple of other factors.

7 Q. Right. And were you concerned at that point in
8 time that the State was continuing to proceed with this case
9 as a death penalty case?

10 A. I think whenever the ultimate sanction is being
11 requested by the government, it is always a concern. Proper
12 management of a death penalty case is different than
13 management of other types of cases.

14 Q. Were you concerned that there wasn't enough
15 evidence in this case to prove that this case was a death
16 penalty case?

17 MR. HAMMOND: Your Honor, objection.

18 First of all, these questions go beyond
19 the affidavit submitted by the State setting forth its basis
20 for seeking to have Judge Lindberg removed. But apart from
21 that, this process of questioning a judge about his mind on a
22 capital case, while he is still the presiding -- the judge
23 presiding over this, I think it is improper in the absence of
24 some foundation that I don't believe has been established
25 here at all.

1 THE COURT: Mr. Butner?

2 MR. BUTNER: Judge, this is about whether the
3 State can receive a fair and impartial trial in this case.
4 And the Judge has already indicated that he inquired of me --
5 after his prior determination that there were three death
6 penalty aggravators having been proved to a probable cause
7 standard -- he inquired of me as to whether we were
8 continuing to evaluate the allegation of the death penalty.
9 And I think that this inquiry is directed specifically at his
10 bias, and whether he can be a fair and impartial judge on
11 this case, and whether there is undue favoritism in favor of
12 the defendant, or undue antagonism against the State. And
13 quite frankly, it goes directly to the issue of the death
14 penalty case -- the death penalty in this case.

15 THE COURT: Well, with regard to the specific
16 question whether he had concerns about the quantum of
17 evidence that he believed at this point in the case that the
18 State could prove, I don't think shows any sort of bias. I
19 am not going to let you inquire into Judge Lindberg's
20 subjective state of mind on any issue other than with regard
21 to whether he harbors unreasonable bias or prejudice towards
22 the State.

23 Having said that, I am going to overrule
24 the objection and let you answer the question.

25 THE WITNESS: Could I have the question again.

1 MR. BUTNER: I will give it a shot. I think I
2 can get it.

3 Q. Were you concerned that there was not enough
4 evidence in this case for the State to proceed as a death
5 penalty case?

6 A. No.

7 Q. What was the reason that you asked that question,
8 Judge?

9 A. To ensure that both sides are going forward with
10 the case with a diligence that I think is required for a case
11 that requires that -- where the State has asked me for that
12 ultimate sanction.

13 Q. Did you ask that question in order to encourage me
14 to and the State to continue to evaluate the allegation of
15 the death penalty in this case?

16 A. Given that I think there is an ethical obligation
17 for the State to continue to do that, yes. And I received an
18 answer from you that indicated your compliance with my belief
19 that that is required.

20 Q. Judge, when you asked that question, were you
21 indicating your doubts to the State that we should proceed
22 with this as a death penalty case?

23 A. No.

24 Q. Do you have such doubts?

25 A. As to whether the State should proceed, I think

1 that is an executive branch decision. I don't think that I
2 can answer that.

3 Q. Well, the question is directed to you. Do you
4 have such doubts; yes or no?

5 A. As to whether the State should proceed with this
6 case as a death penalty case?

7 Q. Yes, Your Honor.

8 A. No, I think that is within your prerogative.

9 Q. And when we were having the off-the-record
10 discussion in chambers concerning the penalty phase --

11 A. On March 30th?

12 Q. On March 30th, correct. Thank you.

13 -- did you continue to have concerns as
14 to whether the State would be evaluating the on-going
15 allegations of the death penalty?

16 A. No, not really.

17 But I should note for the record that I
18 have had under advisement a motion by the defense with regard
19 to whether there should be some sanction for the State's
20 failure to comply with discovery orders, and one of the
21 remedies that they were suggesting was the removal of the
22 death penalty. So it was and is still an issue in the case,
23 potentially.

24 Q. Judge, have you ever presided over a death penalty
25 case before?

1 A. Never.

2 Q. Are you morally opposed to imposition of the death
3 penalty?

4 A. No.

5 Q. Do you understand that your comments concerning
6 whether we were going to get to the penalty phase could cause
7 a party in this case to be concerned about your impartiality
8 in this case?

9 A. No.

10 Q. Do you think that your comments concerning whether
11 we would reach the penalty phase might demonstrate the
12 appearance of impropriety on your part?

13 A. I don't, because I recognize that the defendant is
14 presumed by law to be innocent. I engage in that. The
15 burden of proof is on the government to prove beyond a
16 reasonable doubt that he is guilty of the offense to begin
17 with. And then when the penalty phase is arrived at, it is
18 the jury's decision as to aggravating factors, the Court's
19 decision with regard to potential mitigating factors. To
20 some extent I recognize the jury makes a determination,
21 ultimately, of what the penalty phase is, whether the death
22 penalty will be given -- pardon me, that is the jury's
23 decision on mitigating factors also, and they can consider
24 things that are not even enumerated or argued by the parties.

25 And, therefore, since it is the State's

1 burden and beyond a reasonable doubt, I don't -- I guess I
2 don't see what you are seeing to file the motion.

3 Q. Judge, when you made the comment about whether we
4 were going to get to the penalty phase or not, you were
5 indicating your concern as to whether there was sufficient
6 proof even to convict the defendant; is that correct?

7 A. I have been a lawyer for 33 years, Mr. Butner. I
8 have been a defense attorney. I have been a prosecutor. I
9 have seen and handled many cases myself. I have been a judge
10 for nine and a quarter years, and I have seen many cases
11 where I think that the jury has reached a decision that I did
12 not expect.

13 And all my comment was indicating was
14 the -- all it was reflective of was that observation over the
15 years that though I may have found myself in agreement with
16 the jury decisions the majority of the time, I have been
17 quite surprised over the years by findings of not guilty when
18 I thought the verdict would be guilty; when there have been
19 findings of guilty when I thought the verdict would be not
20 guilty. And so whenever there is a jury trial, there is
21 question as to whether the findings will be commensurate with
22 what I believe the evidence would show.

23 So it was a probably flip comment not
24 intended to reflect any opinion that I have about the merits
25 of this particular case.

1 Q. But it was a comment that possibly we are not even
2 going to get to the penalty phase based on the evidence?

3 A. It was a comment that based on the law and the
4 presumptions of law and the evidence, some of which I have
5 already heard, that indicates there is always doubt on how a
6 jury is going to react to evidence. And I think that this
7 case, like many cases, could go in a variety of ways that
8 none of us anticipate at this point.

9 MR. BUTNER: If I would have just a moment,
10 Judge?

11 THE COURT: You may.

12 BY MR. BUTNER:

13 Q. Judge, as a result of me filing this motion, is
14 that going to cause you to be antagonistic toward the State
15 of Arizona in the presentation of this case and in the trial
16 in your court?

17 A. No, Mr. Butner.

18 MR. BUTNER: Thank you, Your Honor.

19 THE COURT: Mr. Hammond, you may cross
20 examine.

21 CROSS-EXAMINATION

22 BY MR. HAMMOND:

23 Q. Good morning, Your Honor. I am not able to call
24 you anything other than Judge. So if it makes anyone
25 uncomfortable, you will have to forgive me.

1 A. I am not uncomfortable with that, Mr. Hammond.
2 Thank you.

3 Q. This proceeding that initiated the prosecution
4 against Steven DeMocker began in October of 2008; is that
5 correct?

6 A. Correct.

7 Q. A homicide had occurred in July of that year, and
8 Mr. DeMocker was charged in October?

9 A. This is true.

10 Q. You were relatively promptly appointed to that
11 case?

12 A. After two other judges were noticed.

13 Q. There were two notices very early on, and then you
14 became the judge assigned to the case?

15 A. Correct.

16 Q. And from that day forward, from October of 2008
17 until this very moment, you have been the judge assigned to
18 and presiding over the case of Steven DeMocker versus the
19 State of Arizona?

20 A. Whichever way you wish to phrase the caption, yes,
21 sir.

22 Q. Maybe I have the caption backwards. That may say
23 more about me than about the case.

24 The passage of time in this case over the
25 last, now, year-and-a-half has brought us into your courtroom

1 for evidentiary hearings on -- it would certainly be fair to
2 say numerous occasions.

3 A. That's correct.

4 Q. There were hearings on motions to remand this case
5 to the grand jury?

6 A. There were.

7 Q. There were hearings on the conditions of
8 Mr. DeMocker's confinement?

9 A. Yes.

10 Q. There have been numerous hearings on matters
11 related to the production of documents and evidence in this
12 case?

13 A. That's true.

14 Q. There have been many of those hearings where
15 counsel simply argued motions, and a good many where there
16 have been evidence presented and heard by you?

17 A. That's correct.

18 Q. During that time period, you have come to know a
19 fair amount about the case, as inevitably you would, with the
20 kinds of issues that were presented here?

21 A. I believe so.

22 Q. Over a long period of time?

23 A. Yes, sir.

24 Q. You have issued numerous orders in this case on
25 all the topics I mentioned and others?

1 A. Yes.

2 Q. You have been performing the judicial function in
3 this case on behalf of the judicial branch for that entire
4 period of time?

5 A. Yes, sir.

6 Q. I think I need to pause and ask you to provide us
7 a little bit more background about your tenure as a judge and
8 your tenure as a member of the legal profession. I never
9 thought I would be asking you these questions, but I think
10 for this record, I must do that.

11 Would you tell us, you graduated from law
12 school at the University of Arizona?

13 A. I did, in 1977.

14 THE COURT: Mr. Butner?

15 MR. BUTNER: Judge, I think this is
16 irrelevant.

17 THE COURT: Overruled. With all due respect
18 to Judge Lindberg, however, move through that very quickly.

19 MR. HAMMOND: I will.

20 Q. Would you summarize for us chronologically your
21 employment history as a lawyer following your graduation from
22 law school?

23 A. I worked briefly for an attorney named Albert Noe
24 in a private practice in Tucson. I worked for a law firm
25 named Davis and Montijo doing general practice on the east

1 side of Tucson from 1978 through 1981. In -- excuse me,
2 through July 1979.

3 July 1979, the law firm I was working for
4 broke up, and I took a job as a prosecutor with the City of
5 Tucson, City Attorney's office. Was there from July '79
6 through July '81. Whereupon I was hired as a deputy county
7 attorney in Yavapai County.

8 I was a deputy county attorney for
9 Yavapai County Attorney's office from July 1981 through my
10 appointment to the bench, December of 2000. I was the chief
11 of the criminal division of the County Attorney's office when
12 Chick Hastings was the County Attorney between August of 1987
13 and December of 2000.

14 I was appointed by Governor Hull,
15 December 13th of 2000 to take the newly created Division Six.
16 I have been the judge of Division Six since then. I have
17 been elected twice since. Was assigned some matters --
18 criminal matters when I first became a judge, but very few,
19 because I had been the chief of the criminal division of the
20 County Attorney's office, and would have had conflicts. So
21 Judge Weaver, the presiding judge at that time, assigned me
22 principally to domestic relations and civil matters, probate
23 matters, with a few duties in the criminal area having to do
24 with new cases. So I did arraignments and initial
25 appearances, and had a fairly small percentage of the

1 criminal case load, only dealing with cases that were filed
2 after my appointment.

3 I was assigned by Judge Brutinel to the
4 Verde branch of the county. Handled juvenile matters over
5 there, in addition to civil and domestic relations, probate
6 matters. Principally I had a small portion of the cases,
7 criminal cases, when I was judge in the Verde. That was 2004
8 to 2006.

9 2006 I came back here and was assigned to
10 principally a criminal case load.

11 Q. So then just to summarize very quickly, you have
12 spent just short of 20 years as a public prosecutor?

13 A. Actually 21-and-a-half years.

14 Q. Including the time in Tucson?

15 A. In Tucson.

16 Q. Putting this County Attorney's office together
17 with your Tucson experience.

18 A. Yes, sir.

19 Q. 21 years as a public prosecutor and about a decade
20 as a Superior Court Judge.

21 A. Only nine and a quarter.

22 Q. There are probably days that seems like more than
23 a decade.

24 A. It does.

25 Q. And for the last four years, your docket has been

1 primarily and maybe nearly exclusively criminal cases?

2 A. With just a couple exceptions.

3 Q. Have you had the opportunity over your years as a
4 member of the judicial branch in the state to become familiar
5 with the Code of Judicial Ethics that applies to judges in
6 this state?

7 A. I have.

8 Q. I take it we can all feel confident that you have
9 read those provisions that govern the conduct of judges in
10 this state?

11 A. I have.

12 Q. You know that the rules governing conduct have
13 been amended in the last couple of years after the American
14 Bar Association amended its rules to, in some ways, help
15 provide additional commentary and additional information with
16 respect to the roles of judges and the responsibilities that
17 they have in our judicial system?

18 A. Yes.

19 Q. You are familiar with the current and existing
20 rules on judicial conduct then?

21 A. Yes, sir.

22 Q. You understand that one of the touchstones of
23 those provisions of our judicial code is that a judge must
24 first of all be impartial?

25 A. Yes.

1 Q. A judge must also be fair and apply the law to the
2 facts as honorably as he is able?

3 A. Yes, sir.

4 Q. And as you said to Mr. Butner, you also are aware
5 that a judge has responsibilities to assure that there is not
6 an appearance of judicial impropriety?

7 A. I understand that and agree with it.

8 Q. And you understand that often what appears may be
9 as important to the public as what, in fact, is the case?

10 A. This is true.

11 Q. Mr. Butner asked you about a hearing that occurred
12 back on the 2nd of March in this case, one of the innumerable
13 hearings, and you said that you recalled that hearing?

14 A. I didn't recall the precise date of the hearing.
15 I recalled the event.

16 Q. You recall that one of the matters considered that
17 day was what was entitled an omnibus challenge to the
18 Constitutionality of the Arizona death penalty?

19 A. Yes, sir.

20 Q. Filed on Mr. DeMocker's behalf?

21 A. Yes, by yourself I believe.

22 Q. And argued by me that day?

23 A. Yes, sir.

24 Q. You have ruled on that motion, have you not?

25 A. I have.

1 Q. What was your ruling on that motion?

2 A. I upheld the use of the death penalty under the
3 Constitution of the United States and Arizona. I denied the
4 motion.

5 Q. And you recall, as well, that toward the end of
6 that lengthy afternoon of arguments, you did have a short
7 colloquy on the record with counsel in which you inquired
8 whether this matter -- whether the matter of the death
9 penalty was still under consideration in the office of the
10 Yavapai County Attorney?

11 A. I did.

12 Q. Did you in any way intend in asking that question
13 to suggest that you believed that it was inappropriate if the
14 county and its executive branch chose to proceed in the
15 manner it has, to continue to do so?

16 A. No. But I also recognize that there is great
17 expense in the death penalty litigation, that the jury
18 questionnaires were being considered and produced, that we
19 were going to go to great lengths to assure both sides that
20 we would have a fair and impartial jury through the use of
21 those questionnaires, and/or at least that it was under
22 consideration at the time. I don't remember precisely when
23 in the series of orders that that was finally decided, but I
24 knew that that was what the defense side, anyway, was looking
25 for was a questionnaire. And in order to implement the

1 questionnaire adequately, if the death penalty was still
2 going to be on the table, that there would have -- that there
3 would likely have to be questions as relate to the death
4 penalty. So I needed to know, still need to know, what the
5 State's position is with regard to that.

6 Q. And indeed, that process that you have described
7 of the jury questionnaires has gone forward?

8 A. Yes. The jury questionnaires have been filled out
9 on Monday, Thursday and today of this week.

10 Q. They are being filled out as we speak?

11 A. Yes, sir.

12 Q. And those jury questionnaires contain a number of
13 death penalty related questions, because the death penalty is
14 still at issue in this case?

15 A. Yes, sir.

16 Q. Judge Lindberg, when you asked the question to
17 Mr. Butner about whether this matter, the matter of the death
18 penalty was still under consideration, did Mr. Butner suggest
19 to you in any way that he thought your inquiry was somehow
20 inappropriate?

21 A. I don't recall him responding in that fashion.

22 Q. We happen to have a record on this one. Do you
23 recall Mr. Butner suggesting anything to you about whether
24 asking such a question might demonstrate that you lacked the
25 ability to be fair and impartial in this case?

1 A. No. To the contrary, he indicated that it was
2 always still under consideration in their office, is my
3 recollection of what his response was.

4 Q. Would it be unfair for a third party who observed
5 that conversation to come away believing that Mr. Butner
6 might even have appreciated the inquiry and have deemed it an
7 appropriate inquiry in the context of this capital case at
8 that time?

9 MR. BUTNER: Objection, Judge. Calls for
10 speculation about some third party.

11 THE COURT: Objection is overruled. You may
12 answer.

13 THE WITNESS: I think, given the nature of the
14 colloquy, I don't think anyone would have had a perception
15 that the Court was biased in favor or against the State or
16 the death penalty, or in favor or against the defendant.

17 BY MR. HAMMOND:

18 Q. Rule 10.1(b), Judge Lindberg, as you know,
19 requires that any party who discovers grounds that exist to
20 change a judge to do so within ten days. Ten days from March
21 the 2nd would be March the 12th. Any time within ten days of
22 March the 2nd, did the office of the Yavapai County Attorney
23 provide any notice to you that it had seen reason to doubt
24 your impartiality as a judge in this case?

25 A. You would know that as well as I, Mr. Hammond,

1 because they would be under obligation to provide that notice
2 to you as well, but no, they did not.

3 Q. And since March the 12th, you have also received
4 no notice, until you came onto the witness stand this
5 morning, that the County Attorney might have any question
6 borne of any colloquy between the Court and counsel that
7 occurred a month ago on March the 2nd?

8 A. Correct.

9 Q. The affidavit from the County Attorney's office
10 will speak for itself, but there was no reference in that
11 affidavit to the proceedings of March the 2nd. We had a
12 brief conference with you in chambers this morning on the
13 record. Was any question raised with you at that time about
14 the propriety of the proceedings that occurred on March the
15 2nd in open court?

16 A. No.

17 Q. At any time before you came onto the witness stand
18 this morning, had anyone suggested to you that there might be
19 any question of your fairness and impartiality borne of any
20 comment you made in open court on the 2nd of March?

21 A. No. That was only raised -- any of these issues
22 were only raised under 10.1 with regard to what occurred on
23 March 30.

24 Q. Okay. Let's turn now to March the 30th. I think
25 you have given us your best memory, and I won't ask you to go

1 over that entire conversation again, but I do need to ask you
2 whether you had as of that moment pre-judged how you believed
3 the trial phase of this case was going to go?

4 A. No, because I don't think that is possible.

5 Q. I guess it is conceivable that a judge could
6 decide in his own mind that whatever a jury might do, his
7 mind is made up. And I need to ask you that question.
8 Irrespective of what you know about the system, had you made
9 up your mind about what you believed would happen?

10 A. No.

11 Q. Had you made up your mind about what you believed
12 should happen in the trial of this case?

13 A. No.

14 Q. We know, all of us, that in a death penalty case
15 there are three phases. The first phase is the
16 guilt/innocence phase; correct?

17 A. Yes.

18 Q. Just to be absolutely clear about this, you are
19 telling us that you had not made up your mind, you had not
20 pre-judged in any way how you believed that phase of this
21 case would come out?

22 A. That's true.

23 Q. Either way?

24 A. That's true.

25 Q. There is, then, what is known as the aggravation

1 phase, assuming that there was a guilty verdict?

2 A. That's correct.

3 Q. Have you in any way made up your mind about what
4 you believe either would happen or should happen with respect
5 to the so-called aggravation phase of this case?

6 A. No.

7 Q. So would it then be fair to say that when we talk
8 about the penalty phase, and particularly rebuttal of
9 mitigation, we are really talking about the third and final
10 stage of a death penalty case?

11 A. Yes, sir.

12 Q. And it is a third and final stage of a death
13 penalty case that we only get to if a jury finds guilt beyond
14 a reasonable doubt?

15 A. That's correct.

16 Q. And if the jury also finds the existing of
17 aggravating factors beyond a reasonable doubt?

18 A. That's true.

19 Q. And in your comment in chambers on March the 30th,
20 were you intending to imply anything other than that these
21 two steps have to occur before we ever get to the question of
22 what evidence will be presented in mitigation and what
23 evidence will be presented in response to mitigation?

24 A. I was not intending to convey anything other than
25 what you have said. There are contingencies that must occur

1 before you get to that stage.

2 Q. Something that everyone in that room obviously
3 knew and has known for quite sometime?

4 A. I imagine so.

5 Q. Judge, you have had now a couple of hours to read
6 the affidavit that was filed this morning and to have a
7 conference with us in chambers on the record, and now you
8 have had an opportunity to appear here in court as a witness.
9 Do you believe in any way that you are not capable of
10 providing a fair and impartial trial in this matter?

11 A. No.

12 MR. HAMMOND: Give me just a moment, Your
13 Honor.

14 Thank you.

15 THE COURT: Mr. Butner, redirect.

16 MR. BUTNER: Thanks, judge.

17 REDIRECT EXAMINATION

18 BY MR. BUTNER:

19 Q. Judge Lindberg, in your answers to Mr. Hammond's
20 questions, you indicated one of the concerns that you had
21 when were you talking to me about whether the State was
22 continuing to evaluate the allegation of the death penalty
23 was the great expense in handling a death penalty case. Is
24 that correct?

25 A. That's correct.

1 Q. And were you concerned at that point in time that
2 there was not sufficient evidence, as you had seen it in this
3 case, to proceed with this case as a death penalty case?

4 A. No.

5 Q. Why were you concerned about the expense at that
6 point in time?

7 A. Well, as I think all parties, including the Court
8 and -- or at least all of the lawyers are concerned, I think
9 we all recognize that the litigation in a capital case
10 involves a number of witnesses who would not otherwise be
11 required in a simple guilt or innocence phase process of any
12 other type of case, other than a capital case. The
13 appointment of mitigation specialists, if a defendant is
14 indigent, the reviews that are -- that if the death penalty
15 is imposed automatically occur in the Supreme Court, the
16 reviews that are conducted then on federal habeas corpus, the
17 protracted nature of the litigation, given what the current
18 economic times are, in particular, for the county and the
19 state, I wanted to ascertain that this was the direction in
20 which the local prosecutor's office, the Yavapai County
21 Attorney's office wished to proceed. And also thought that
22 that is a matter that should be reviewed on a consistent
23 basis over the course of time as further evidence is
24 discovered, having been assured by the County Attorney's
25 office that there was on-going discovery going on in the

1 case.

2 Q. So, if I understand your testimony, as a result of
3 this great amount of expense, you felt that the allegation of
4 the death penalty was a matter that should be consistently
5 reviewed by the State?

6 A. Yes, and I was assured that it was.

7 Q. So, you actually were encouraging the State to
8 continue to review the allegation of the death penalty when
9 you made that inquiry; right, Judge?

10 A. It was an inquiry, not an encouragement.

11 Q. Is it part of your job duties to make sure that
12 not too much taxpayer money is spent in handling a case like
13 this, a death penalty case?

14 A. I wouldn't phrase it that way, no.

15 Q. But you were concerned about that when you made
16 that inquiry; is that correct, Judge?

17 A. That was one of the concerns, Mr. Butner, yes.

18 MR. BUTNER: I don't have any further
19 questions of this witness. Thank you.

20 THE COURT: You may step down, sir.

21 Mr. Butner, you may call the next
22 witness.

23 MR. BUTNER: I would like to call Mr. Paupore
24 to the stand, Judge.

25 THE CLERK: You do solemnly swear or affirm

1 under the penalty of perjury that the testimony you are about
2 to give will be the truth, the whole truth, and nothing but
3 the truth, so help you God?

4 THE WITNESS: I do.

5 JEFFERY PAUPORE,
6 called as a witness, having been duly sworn, testified as
7 follows:

8 DIRECT EXAMINATION

9 BY MR. BUTNER:

10 Q. Please state your name for the record, sir.

11 A. Jeffery Paupore.

12 Q. And what is your occupation?

13 A. Deputy county attorney for Yavapai County.

14 Q. And were you performing your duties as a deputy
15 Yavapai county attorney on March 30th of the year 2010?

16 A. I was.

17 Q. Were you present in chambers, in Judge Lindberg's
18 chambers, on that date when an off-the-record discussion was
19 taking place?

20 A. Yes.

21 Q. Present in chambers at that time was Mr. Sears,
22 Mr. Hammond, Ms. Chapman, yourself and me, as well as Judge
23 Lindberg; is that correct?

24 A. Yes.

25 Q. Do you recall the discussion off the record with

1 no court reporter present turning to the topic of Rule 404(b)
2 evidence?

3 A. Yes.

4 Q. And thereafter, do you recall the subject of
5 discussion turning to whether the State was going to offer
6 certain types of 404(b) evidence, so to speak, that it was
7 not going to offer in its case in chief, but it was going to
8 offer it in the penalty stage of the case, if we reached that
9 point?

10 A. I do recall the conversation.

11 Q. Do you recall Judge Lindberg making any comments
12 when we touched upon that topic?

13 A. I do.

14 Q. Do you recall his comments or comment with
15 specificity?

16 A. I do.

17 Q. Where were you seated in the room?

18 A. I was seated just off of the judge's left, in
19 front of his desk and a little behind Mr. Hammond. More
20 offset behind Mr. Hammond and looking directly at the judge.

21 Q. And where was I seated?

22 A. You were across the room to my left, closer to
23 Judge Lindberg -- Judge Lindberg's right, just right of his
24 person and his desk.

25 Q. So you were off to the left, and I was off to the

1 right, and Mr. Hammond and Mr. Sears were in front of the
2 judge; is that correct?

3 A. That's correct.

4 Q. And Ms. Chapman was in the back seated on the
5 couch?

6 A. She was in the back, kind of parallel in the room
7 as to where my position was.

8 Q. And when we touched on the topic of the penalty
9 stage of the case, what specifically did Judge Lindberg say?

10 A. I heard Judge Lindberg say that he did not believe
11 that we would get there, meaning the penalty phase.

12 Q. Did you thereafter bring that to my attention?

13 A. I did.

14 Q. And what was my reaction when you brought it to my
15 attention?

16 A. You recalled the same statement and were writing
17 it down or had written it down as to what you recalled.

18 Q. And were you concerned at that point in time about
19 Judge Lindberg's ability to be fair and impartial in handling
20 this case?

21 A. My first reaction when I heard the comment was I
22 was surprised. I was -- it was not solicited, so I was just
23 kind of -- that was quite a remark to make. And as I thought
24 about it and as we talked about it between you and I, I
25 became more concerned. I felt that he was commenting on the

1 strength of the evidence.

2 Q. Did you interpret this as a flip remark by Judge
3 Lindberg?

4 A. I think it was. It was unsolicited. It just --
5 he just rolled it out there, and there was nobody else
6 speaking in the room at the time, so I clearly heard what he
7 said.

8 Q. Did this raise a serious question in your mind
9 about his ability to be fair and impartial in this case?

10 A. I have a great deal of respect for Judge Lindberg,
11 and I believe he is an honest and fair judge and works very
12 hard at his profession, but the comment struck me as
13 inappropriate based on the context of where we were in the
14 case and caused me -- caused me some concern.

15 Q. Did this appear to you to be an impropriety on
16 Judge Lindberg's part?

17 A. I didn't see the need for the statement to be made
18 in the first place. It wasn't as a result of a question or
19 inquiry by any other persons in the room. And I felt that it
20 was a glimpse or a snapshot, if you will, of his thought
21 process and his thinking about the case.

22 MR. BUTNER: No further questions of this
23 witness at this time.

24 THE COURT: Mr. Hammond.

25

CROSS-EXAMINATION

BY MR. HAMMOND:

Q. Mr. Paupore, when did you get assigned to this case?

A. I don't really recall, Mr. Hammond, because so much has happened since I have been in the case, it is kind of like a blur, quite frankly. It is a couple of months for sure, might be longer.

Q. A couple of months would have put you back before the 2nd of March?

A. It was before that.

Q. Were you in court the 2nd of March?

A. Yes, sir, I was.

Q. Did you hear the oral argument that afternoon?

A. Yes, sir, I did.

Q. Did you hear the comment that Mr. Butner asked Judge Lindberg about, the comment that Judge Lindberg made inquiring as to the County Attorney's review and process with respect to the death penalty?

A. I did hear the judge address Mr. Butner in a fashion such as you described.

Q. What do you recall about that?

A. It was at the very end of the -- I believe Judge Lindberg had already made his decision, denying the defendant's motion to find the death penalty

1 unconstitutional. And it was towards the very, very end of
2 that hearing, Judge Lindberg asked Mr. Butner if the State
3 was looking at the propriety of the allegation of the death
4 penalty in the case, something to that effect. I can't say I
5 recall every word that he had spoken.

6 Q. Do you think he used the word propriety?

7 A. No. That is my word. Like I say, I did not
8 recall. I just recall him asking about whether the County
9 Attorney's office was evaluating continually or looking at
10 the allegation.

11 Q. And do you recall what Mr. Butner said in
12 response?

13 A. About the same fashion as I recall what the judge
14 said, that yes, he felt it was his obligation to always look
15 at that allegation in a case such as this.

16 Q. Did you think that there was something
17 inappropriate about Judge Lindberg's inquiry on that date?

18 A. Not at that time.

19 Q. Did you think there was anything that indicated
20 that he had pre-judged this case?

21 A. No. There was no way to read any of that into his
22 comments.

23 Q. On the 30th of March, the in-chambers conversation
24 that we were talking about, how long did that session last?

25 A. I believe we were scheduled for the hearings

1 scheduled for that day to commence at 2:30 and end at 5:00.
2 But we did not, I don't believe, got on the record until
3 after 3:00. So I didn't time the entire meeting, but it was
4 at least 20 minutes long, I would guess.

5 Q. Do you remember while we were in chambers hearing
6 the three o'clock chimes on the clock outside?

7 A. Yes, I do.

8 Q. That would have been half an hour from the
9 scheduled time from the commencement of the proceeding?

10 A. You are right.

11 Q. Would it be fair to say, then, that the
12 conversation in chambers lasted at least half an hour?

13 A. I would agree with that.

14 Q. And maybe more?

15 A. And maybe more.

16 Q. So during that conversation, we all spoke about a
17 number of topics; isn't that right?

18 A. That's correct.

19 Q. This is not the only topic that we talked about in
20 that span of half an hour or 40 minutes?

21 A. My recollection that the reason for the
22 in-chambers meeting was to discuss the issue of whether the
23 court should be open or closed to avoid any leakage to the
24 public about what was going on.

25 Q. And that was with respect to the expected

1 examination of a witness who was to be heard that afternoon?

2 A. That's correct.

3 Q. There was a fair amount of conversation back and
4 forth about that particular matter?

5 A. Yes, sir.

6 Q. And the witness in question is someone who the
7 State has identified as someone from whom it intends or
8 intended to elicit evidence on a variety of subjects; isn't
9 that correct?

10 A. There was a wide range of topics that were going
11 to be discussed that day.

12 Q. I don't want to go into the details of them, but
13 it would be fair to say that there were more than half a
14 dozen and probably ten or more different topics that the
15 County Attorney's office expected or hoped to review with
16 that witness that afternoon?

17 A. I would agree with that.

18 Q. And the County Attorney's office had also said
19 that some of those topics were ones that your office would
20 not intend to introduce at the trial itself?

21 A. That's correct. And I do believe Mr. Sears was
22 trying to find out from Mr. Butner some of these areas of
23 evidence and if that evidence was going to be used in case in
24 chief. And we had discussions about that evidence.

25 Q. So the context here is that we have a long list of

1 evidence items, some of them the County Attorney might hope
2 to use in their case in chief?

3 A. Correct.

4 Q. And some of them the County Attorney would
5 acknowledge, and indeed had acknowledged in a pleading, would
6 be reserved for rebuttal?

7 A. Correct.

8 Q. Rebuttal at the mitigation stage?

9 A. Rebuttal at the mitigation stage.

10 Q. Not rebuttal in the merits phase of the case but
11 rebuttal at the mitigation stage?

12 A. Yes.

13 Q. And we then went through together that relatively
14 long list to talk about, if not all, most of those items of
15 evidence; isn't that correct?

16 A. Well, I don't know about a long list. There was a
17 couple of areas that Mr. Butner said the State was not
18 intending to use, and there were a couple of individual names
19 that were brought out that he said we were not going to call
20 in the case in chief.

21 Q. And then you recall that there was some
22 conversation, then, that as to some of these items there
23 would be no need to go into them today, or that day, March
24 the 30th, in court because those items would only become
25 relevant if we get down to the final stage of this case?

1 A. Correct.

2 Q. And it was in the context of that particular part
3 of the conversation, was it not, in which the judge made the
4 comment that has caused your office to file its motion today?

5 A. It was at the very end of, I think, the session
6 in -- and in that part of the discussion about the penalty
7 phase of a trial that the comment was made.

8 Q. And what was happening at that moment was that we
9 were, all of us, agreeing that these matters that were going
10 to be considered, if at all, only at the mitigation stage,
11 need not be addressed today?

12 A. I believe that is accurate.

13 Q. Okay. And it was in that context that you believe
14 that judge said he didn't think we were going to get there?

15 A. He said, "I don't believe we are going to get
16 there." That is what I heard him say in that part of the
17 meeting.

18 Q. And I take it from your testimony here, you sat
19 here and listened to Judge Lindberg testify today, and you
20 heard what he said he remembered saying?

21 A. Yes, sir.

22 Q. I take it you disagree with him?

23 A. I disagree as to the exact words that I heard him
24 say. Yes.

25 Q. So having now heard him, do you contend on behalf

1 of the State that Judge Lindberg is really not capable of
2 providing a fair and impartial trial of this matter?

3 A. I have questions of that concern. Do I -- can I
4 say categorically that he cannot? No, I cannot. But the
5 comment was unsolicited. It came out, and like I said, I
6 think that was a snapshot into his thought process. So I
7 have my questions as this point, yes, I do.

8 Q. But in the last couple of months we have had
9 opportunities for lots of snapshots. At least since you have
10 been in the case, we have had numerous conferences with the
11 Court; isn't that true?

12 A. Yes, sir.

13 Q. Most of those, indeed almost all of them, have
14 been on the record?

15 A. Yes, sir.

16 Q. And on various occasions he has made comments
17 about how he either was ruling or intended to rule on -- I
18 couldn't begin to count -- but it is some scores of numbers
19 of motions?

20 A. Yes. And one -- today's hearings, as you know,
21 Mr. Hammond, are -- in the DeMocker case, deal with a
22 multitude of motions that address or -- and a part of the
23 defense is trying to preclude into the case, and some of it
24 is very material and important evidence to the State's case.

25 With the significance of what is at stake

1 on these numerous pending motions, my concern about that
2 comment was can he be fair and impartial in deciding on these
3 multitude of evidentiary issues that is facing -- that he
4 will be facing, if he proceeds as the judge? And that caused
5 me great concern, in context with his comment on Tuesday,
6 March 30th.

7 Q. You also know, Mr. Paupore, that after that
8 in-chambers conference, we all walked out into the courtroom?

9 A. Yes, sir.

10 Q. Did you say anything about the concern you have
11 expressed this morning to the judge?

12 A. No, I did not.

13 Q. Did you say anything about the expression of
14 concern you have identified today to defense counsel?

15 A. No, sir.

16 Q. And indeed what happened after we finished that
17 in-chambers conference is we went into open court and --
18 sorry, not open court, into a sealed courtroom -- and had a
19 hearing?

20 A. We did.

21 Q. And at the end of that hearing, the judge ruled on
22 numerous matters relating to that particular witness?

23 A. At that 404(b) hearing, he did. Yes, sir.

24 Q. He ruled from the bench?

25 A. Yes, sir.

1 Q. And in large measure he ruled against Yavapai
2 County?

3 A. I would agree with that.

4 Q. On most of the issues, he said you will not
5 present that testimony, not in these words, but you will not
6 present that testimony?

7 A. He precluded, if there were ten, and I don't have
8 a fixed number of how many issues, but if there were ten, he
9 probably precluded seven, the majority of them.

10 Q. And it was sometime after you received those
11 negative rulings that you and Mr. Butner had a conversation
12 about whether the judge could be fair and impartial?

13 A. Yes.

14 Q. And you said that when you had that conversation,
15 Mr. Butner said he had written down what he thought the
16 comment was?

17 A. He had written it down or was writing it down
18 exactly what he recalled, which is what I had recalled.

19 Q. When did that conversation occur?

20 A. I don't think we finished the hearings until close
21 to 5:30 that day, so it would have been shortly right after
22 that.

23 Q. Were you still in the courtroom?

24 A. No, sir.

25 Q. Where were you?

1 A. In our office.

2 Q. Have you seen the written note that Mr. Butner
3 made?

4 A. Yes, I did.

5 Q. Do you have it?

6 A. No. No, sir, I do not.

7 Q. After you had the conversation with Mr. Butner,
8 did you and he agree on a course of action?

9 A. Not right away, no, sir.

10 Q. Did you talk about providing notice to the Court
11 of your concern?

12 A. The actual decision that brought us here today was
13 not made until late yesterday.

14 Q. You know that on Monday of this week, jurors began
15 to fill out the questionnaires that Judge Lindberg talked
16 about?

17 A. Yes, sir.

18 Q. You also know that that process continued again
19 yesterday?

20 A. I am aware of that.

21 Q. You know that in those two days an excess of 200
22 jurors have been brought into courthouses in Yavapai County
23 to fill out questionnaires?

24 A. I am not sure the number, Mr. Hammond, but I
25 know -- I heard there was something like 500 jurors that were

1 going to be filling out questionnaires. I am not sure if
2 that is accurate.

3 Q. Whatever that number is, it is a very large
4 number, and you knew that it was on-going and was going to
5 continue yesterday and today?

6 A. Yes, sir.

7 Q. And you did not choose to bring this matter to the
8 attention of the judge until this morning?

9 A. That's correct.

10 MR. HAMMOND: I need just a moment.

11 Your Honor, before I conclude my
12 examination, I would like the County to produce the
13 handwritten note from Mr. Butner, so that we can, at least,
14 have it in the record.

15 THE COURT: Mr. Butner.

16 MR. BUTNER: Judge, I object to that. That is
17 asking for my personal notes concerning these matters. I
18 don't think that is appropriate. Those are privileged.

19 THE COURT: I don't want to see your notes,
20 except for that specific one. You are the one that asked the
21 question. You are the one that raised that such a note
22 existed. I would like to see it.

23 MR. BUTNER: No, I am not, Judge. I never
24 mentioned that such a note --

25 THE COURT: You asked about the conversation

1 with Mr. Paupore, and your specific concerns that you shared,
2 and I thought you specifically said you made a note.

3 MR. BUTNER: No, I did not, Judge. That came
4 up in Mr. Hammond's question. I did not mention that I made
5 a note. We discussed the specific language.

6 THE COURT: Do you have it, Mr. Butner?

7 MR. BUTNER: I think I might, Judge.

8 THE COURT: I would like to see it.

9 MR. HAMMOND: Your Honor, just so the record
10 is clear, and I often don't trust my memory -- it is good to
11 have the court reporter here -- but I do believe that the
12 testimony about Mr. Butner writing down a note came from a
13 question Mr. Butner asked Mr. Paupore on direct examination.

14 MR. BUTNER: Please note my objection for the
15 record, Judge.

16 THE COURT: I note your objection. Go ahead
17 and bring it up here. Joe, if you would come on up. I don't
18 want to read your notes. I want to see that specific
19 notation.

20 MR. BUTNER: Yes, sir.

21 THE COURT: Specifically, for the record, it
22 says, quote, I don't think -- the think is scratched out --
23 it says "believe" we are going to get there. It makes
24 reference to the fact that that was Judge Lindberg's
25 statement.

1 Thank you, Mr. Butner. That is what it
2 says. You don't need to see the rest of his notes. That's
3 what it says.

4 MR. HAMMOND: I'm sorry. Could I have the
5 court reporter read back what the Court just said.

6 THE COURT: You may.

7 (Whereupon, the relevant portion
8 of the record was read back.)

9 THE COURT: The word "think" is scratched out.
10 It is written in "believe."

11 MR. HAMMOND: So, Mr. Butner's note itself has
12 the word "think" crossed out and the word "believe."

13 THE COURT: That's correct.

14 MR. HAMMOND: So if you read it without the
15 crossed out, it would be, "I don't believe we are going to
16 get there"?

17 THE COURT: Correct.

18 MR. HAMMOND: I don't have any further
19 questions for this witness.

20 THE COURT: Mr. Butner, redirect.

21 MR. BUTNER: No further questions.

22 THE COURT: Sir, you may step down.

23 Mr. Butner, do you wish to call any
24 additional witnesses?

25 MR. BUTNER: No, Your Honor.

1 THE COURT: Mr. Hammond, do you wish to call
2 any witnesses?

3 MR. HAMMOND: May I have a moment, Your Honor?

4 THE COURT: You may.

5 MR. HAMMOND: Your Honor, I would like to call
6 Larry Hammond to the stand.

7 THE COURT: I precluded Mr. Butner from
8 calling you. I would be interested in knowing about what.

9 MR. HAMMOND: I do want to answer under oath
10 questions about my memory of what happened in chambers.

11 THE COURT: Mr. Butner, I precluded you from
12 it. Do you have an objection to that?

13 MR. BUTNER: Yes, I do.

14 THE COURT: I am not going to let you testify,
15 Mr. Hammond.

16 MR. HAMMOND: Thank you.

17 THE COURT: Mr. Butner, I will hear from you.

18 MR. BUTNER: Judge, this is strange new ground
19 for me. And I filed this motion, as I stated earlier, with
20 much trepidation. But I do believe what happened on March
21 30th is, as Mr. Paupore put it, we did get a snapshot into
22 Judge Lindberg's mind concerning this case.

23 If you will recall the testimony, of
24 course, from Judge Lindberg, he didn't specifically recall
25 what he said. He had two comments that basically indicated

1 something along the lines of, if we reach the penalty phase,
2 something along those lines. Ms. Chapman didn't have a
3 specific recollection of the comment, either. The only
4 witness that we have had with a specific recollection was
5 Mr. Paupore. And, of course, I offered my affidavit.

6 I heard that comment. This was before
7 the evidentiary hearing. I realize this isn't part of the
8 record at this point, but we were running -- it is part of
9 the record that we were running behind, and as we often do in
10 this case, and so we went into court and got on with the
11 hearing. We had a witness that was under subpoena and
12 waiting, and it went -- I think it probably went longer than
13 everybody had anticipated. It filled up the day.

14 There wasn't an opportunity to discuss it
15 at that point in time. Thereafter, there was opportunity to
16 discuss it. It seems to me, Judge, that in looking back,
17 coupled with Judge Lindberg's inquiry about whether the State
18 was continuing to review the allegations of the death
19 penalty, that Judge Lindberg was expressing bias and
20 prejudice when he made that comment about "I don't believe we
21 are going to get there," concerning the State's case.

22 He, according to his testimony now, I
23 think it is more understandable, he was apparently concerned
24 about the great expense that we are all going to in this
25 case, in terms of putting this case on, but I think he also

1 was concerned about the level of proof, so to speak, because
2 he had already ruled on the aggravating factors in this case,
3 in terms of whether probable cause existed to get to the
4 penalty phase, if and when there was a conviction. So that
5 comment was specifically directed, if you will, to the level
6 of proof of, I don't think you are going to get a conviction.
7 That's the way --

8 THE COURT: You cited the State versus Henry
9 and State versus Peralta which makes it pretty clear that it
10 isn't a manifestation of bias or prejudice, which is my
11 understanding as well, to comment based upon the evidence
12 that you have already heard.

13 Assuming that he said what you are saying
14 he said, how is it bias and prejudice?

15 MR. BUTNER: Judge, we have had on-going
16 litigation in this case. This has been a battle all along
17 the way, you know, and that is really, probably the way it
18 should be. But the judge doesn't know all of the items of
19 proof that the State has at this point in time even. And for
20 him to make that comment at that point in time, saying "I
21 don't believe we are going to get there," is a comment that I
22 don't believe you are ever going to have enough evidence to
23 get there. Not looking in retrospect, that is a comment
24 directed toward the future, "I don't believe we are going to
25 get there, Mr. Butner." He didn't say Mr. Butner. But I, of

1 course, listened to that. I was very surprised to hear that
2 and taken aback, and obviously, very concerned.

3 This has been a difficult case to
4 litigate. There have been numerous motions filed by the
5 defense in this case. The thrust of many of these motions is
6 that the State is not disclosing in a timely fashion. They
7 are running behind in terms of their investigation. And we
8 have got a trial date, and they are not giving us all of
9 their evidence, et cetera.

10 Well, the State has been continuing to
11 investigate this case all along, as is our duty, as is our
12 obligation. And we are disclosing the evidence, basically,
13 as fast as we get it. And for the Court to make that
14 comment, it demonstrated to me that there was undue
15 antagonism that had been developed as a result of this
16 litigation toward the State's case, toward the Yavapai County
17 Sheriff's Office. And it demonstrated, and I think quite
18 clearly, was a remark that was not appropriate at the time.
19 It was a flip comment, as the judge alluded to. It was a
20 remark at the time that "I don't think you are going to get
21 there." That was the tone.

22 And I think it demonstrated that the
23 judge -- that we are not dealing with a level playing field
24 here. That we are digging out of a hole in front of this
25 judge, and he doesn't think we are going to get there. And

1 he has pre-judged this case at that point in time, that he
2 doesn't think the State is going to get there. That's not
3 right. That clearly is inappropriate on his part. That
4 clearly sends a message to the State. "I don't think you are
5 going to get there."

6 And I think it also indicates that he
7 didn't believe -- and that is why I referred in my affidavit
8 to the March 2nd colloquy that he and I had, he doesn't
9 believe that the State should have filed the death penalty
10 allegation in this case, despite the fact that there was
11 sufficient proof to a probable cause standard for three
12 aggravators.

13 THE COURT: Whether he believed it or not, he
14 was able to set aside any personal belief you might think he
15 has, and rule as required to do by the facts in the law.

16 MR. BUTNER: He was in that regard and in
17 regard to those aggravators, Judge. But when he made that
18 statement about "I don't believe you are going to get there,"
19 I don't think at that point in time that he was unbiased any
20 longer. I don't think -- I think he demonstrated clearly
21 that he was no longer impartial. And we're in a difficult
22 position with him. And so that's what gives rise to this
23 notice for cause.

24 THE COURT: Well, thank you, Mr. Butner.

25 Mr. Hammond.

1 MR. HAMMOND: I believe that the question that
2 this Court is required to answer under our rules is whether
3 you find by a preponderance of the evidence presented that
4 the judge in this case, Tom Lindberg, is not capable of and
5 is not providing a fair and impartial hearing in this case,
6 both to the State and to the defense.

7 The shortest and simplest answer is that
8 the evidence presented here does not support that finding.
9 If we were simply talking about differing memories of a
10 conversation in chambers in the course of a case in which
11 there have been countless conversations, both off the record
12 and on, I would submit even if you were to find that
13 Mr. Paupore's memory is the correct memory, it would not
14 constitute a basis for finding that this judge is not capable
15 of being fair and has not been fair and impartial.

16 But Judge Lindberg came in here, and
17 under oath said that he could not have made that statement.
18 He has a memory that it was logical to say, and he did say
19 something about, we will deal with these penalty phase issues
20 if we get there. That doesn't sound to I think any of us, at
21 least on the defense side, as a pre-judgment of the case.
22 But whatever that comment was, I would submit to you, that it
23 does not constitute a basis under Rule 10 for disqualifying
24 this judge. Nor does it constitute a basis under the canons
25 of judicial ethics to call into question whether this judge

1 can do the job assigned to him as a member of the judicial
2 branch.

3 The statement we made this morning in
4 Judge Lindberg's court, I will make again here today. We
5 believe that this motion has been filed in bad faith. We do
6 not believe there is a good faith basis for questioning
7 whether this Yavapai County Superior Court judge is anything
8 other than someone who is trying his best to be fair and
9 impartial.

10 And I must say, the irony of this is
11 weighing on us this morning. We have, over the last 16
12 months, lost countless motions. Our client is still in
13 custody today, despite numerous efforts by us to have his
14 bond reduced, to have his conditions of confinement changed.
15 At one point the Court ordered that he be allowed to have a
16 computer in his cell, so that he could help manage and review
17 some of this evidence and assist in his defense. Mr. Butner
18 and the county then objected to it, and the judge withdraw
19 his order.

20 If this Court were actually going to try
21 to figure out whether Judge Lindberg has been and can be
22 capable of being a fair and impartial judge, we submit to you
23 that you would have to review the record of what he's done
24 over the last 16 months. And I suspect at the end of that
25 time, if this Court were ever to do that, you would probably

1 have to say he either has exhibited no comment that would
2 constitute a lack of fairness and impartiality, or maybe he
3 is being unfair and impartial to the defense. But we aren't
4 standing here making that argument.

5 We have been at this job a long, long
6 time. We are on the lip of trial. We have jurors here. We
7 were at a point at which everyone knows that we are facing a
8 long and difficult death penalty trial, and at the last
9 moment this County Attorney's office has come in and
10 attempted to stop the show. Attempted to prevent us from
11 arguing and deciding a large number, I think there was 16
12 motions that are to be heard today, so that we can at least
13 attempt to get ourselves prepared for trial, and the county
14 doesn't want to do that. The county knows that if this court
15 does not disqualify Judge Lindberg, we will be proceeding
16 with those motions and we will then be proceeding to the
17 trial that Mr. DeMocker is entitled to under the Constitution
18 of Arizona and the United States.

19 In sum, we simply don't believe there is
20 any basis for this motion or for the suggestion that this
21 judge should be removed from this case for cause.

22 Thank you.

23 THE COURT: Thank you, Mr. Hammond.

24 Did you wish to reply, Mr. Butner?

25 MR. BUTNER: Judge, I do.

1 First of all, I note that the Court
2 accepted my avowal at the outset of these proceedings that
3 this motion was not made in bad faith and not for the purpose
4 of delay, and it is not.

5 The State wants to proceed to trial on
6 this case. We all want to get this case tried. We want to
7 get this case done. But the fact of the matter is that that
8 comment was made. It is unfortunate that we weren't making a
9 record at the time. But Judge Lindberg didn't testify that
10 he could not have made that statement. He didn't have a
11 specific recollection, unlike Mr. Paupore. .

12 I understand the argument that, okay, we
13 will give you that, that is exactly what Judge Lindberg said.
14 That still doesn't demonstrate that he cannot be fair and
15 impartial in this case. I would disagree. It does
16 demonstrate that he is looking into the future, that he has a
17 prejudice or a bias at this point in time, and that he
18 doesn't think the State is ever going to be able to make
19 their case to convict Mr. DeMocker.

20 That is not appropriate. That is an
21 undue prejudice. That is an undue antagonism toward the
22 State's case. And it is inappropriate for such a comment to
23 be made, and it is inappropriate for Judge Lindberg to remain
24 as the trial judge on this case because he has demonstrated
25 that he cannot be fair or impartial.

1 THE COURT: Thank you, Mr. Butner.

2 I guess my initial impression is that we
3 were trying to read a tremendous amount into the eight words
4 spoken at the end of -- somewhere between half an hour and
5 hour and a half off-the-record conversation in chambers
6 regarding evidentiary issues. We always take extremely
7 seriously the requirements of the Arizona Constitution and
8 the requirements of the canons of judicial ethics that we
9 both be unbiased and we appear to be unbiased.

10 However, as a practical matter, Judge
11 Lindberg's explanation of what he believed went on makes
12 sense. Ms. Chapman's explanation makes sense. But at the
13 end of this conversation, Judge Lindberg concluded that
14 whatever you decided to do with regard to the penalty phase
15 of this case, we are not there yet. That is something that
16 is going to be decided in the future.

17 You cite me to the law. You cite me to
18 State versus Henry. You cite me to State versus Peralta.
19 That is my understanding of the law, as well. Judge Lindberg
20 would have to have actually manifested some sort of spirit of
21 ill will or hostile feeling.

22 As a factual matter I do find, to the
23 extent we have any idea what Judge Lindberg's comment was,
24 the comment was not yet ripe for a distinction. As a matter
25 of law, I am inclined to agree with Mr. Hammond, even if

1 Judge Lindberg said specifically what you have in your notes,
2 it would not rise to a level of bias and prejudice as I
3 believe is required by the Rule and by Arizona Case Law to
4 require Judge Lindberg to be removed from this case.

5 I, by the way, don't find anything
6 improper in asking either side whether they have complied
7 with their ethical duties regarding the case, whether it is
8 asking you whether or not you continue to evaluate the
9 request for the death penalty in light of the evidence as it
10 develops, or to ask the State whether they are properly
11 representing their client, or if the defense is properly
12 representing their client.

13 Short answer is while I don't find that
14 the motion is brought in bad faith, I do find that the motion
15 is not well taken, and it is denied, and the matter is
16 referred to Judge Lindberg for all further proceedings.

17 Thank you.

18 (Whereupon, these proceedings were concluded.)

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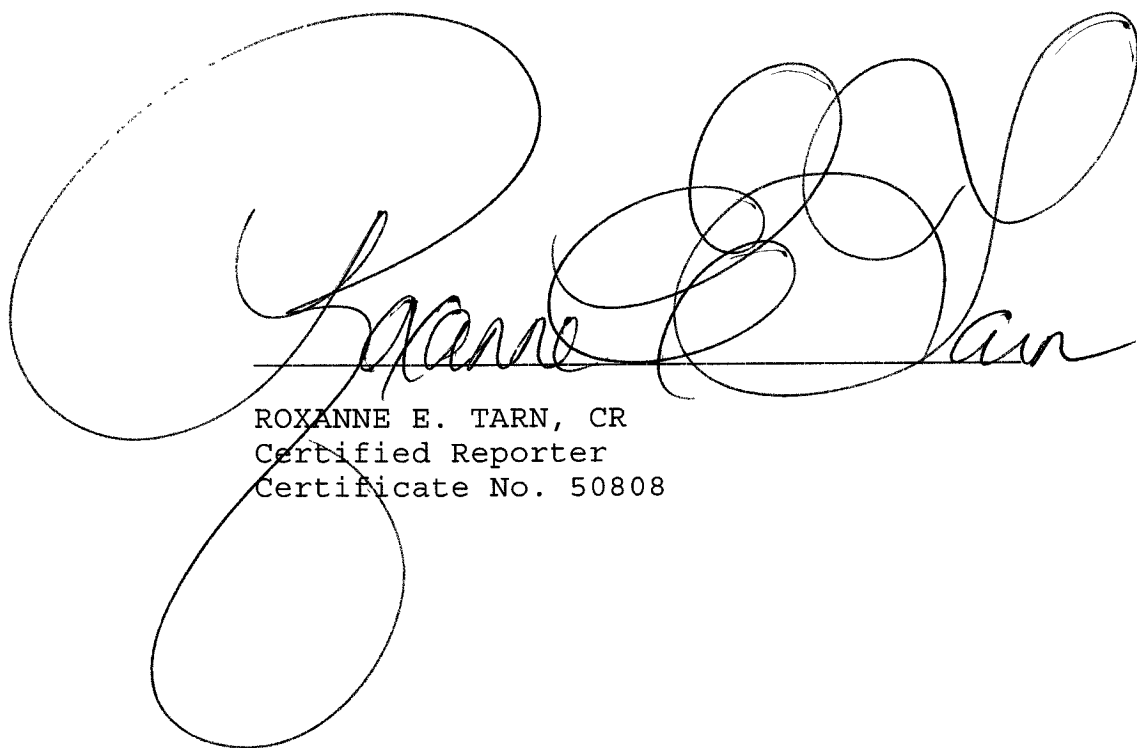
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I, ROXANNE E. TARN, CR, a Certified Reporter
in the State of Arizona, do hereby certify that the foregoing
pages 1 - 84 constitute a full, true, and accurate transcript
of the proceedings had in the foregoing matter, all done to
the best of my skill and ability.

SIGNED and dated this 4th day of April, 2010.

A large, stylized handwritten signature in cursive script, reading "Roxanne E. Tarn", is written over a horizontal line. The signature is fluid and occupies the right half of the page.

ROXANNE E. TARN, CR
Certified Reporter
Certificate No. 50808